No. 94-1705

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ASTON A. BEADLE,

Petitioner,

v.

CITY OF TAMPA, FLORIDA, a Florida municipal corporation, and THE CITY OF TAMPA, FLORIDA, POLICE DEPARTMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF ADVOCATES INTERNATIONAL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Advocates International respectfully moves the Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of counsel for the Petitioner Aston A. Beadle has been obtained; but counsel for Respondents have stated that they neither agree nor object to the filing of a brief by Advocates International.

The movant, Advocates International, is a global network of advocates working in over 150 nations to establish and preserve religious liberty in the United States and abroad. In former Communist countries, Advocates International has worked to establish religious liberty as a part of the rule of law. In the United States, Advocates International has focused on preserving the rights of all minority faiths, and assuring that religious liberties are accorded no less deference than other protected rights. These concerns are squarely implicated in this case.

Dated: May 19, 1995

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE RIGHTS OF RELIGIOUS PEOPLE ARE BEING DISFAVORED, AS COMPARED TO THE RIGHTS OF ALL OTHER PROTECTED GROUPS . 4

II. THE DECISION BELOW CREATES AN IRRECONCILABLE CONFLICT BETWEEN THE ELEVENTH CIRCUIT, WHICH PERMITS EMPLOYERS TO MAKE VIRTUALLY NO ACCOMMODATION, AND CIRCUITS WHICH REQUIRE A SHOWING OF GOOD FAITH EFFORT TO MAKE ACCOMMODATION 7

III. THE GRUDGING SCOPE GIVEN THE "UNDUE HARDSHIP" STANDARD BY THE ELEVENTH CIRCUIT IS NOT CONSTITUTIONALLY REQUIRED 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Beadle v. City of Tampa, 42 F.3d 633 (11th Cir. 1995) 8-10

Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979) 8-10

Burns v. Southern Pac. Transport. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) 8

Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) 10

Kent v. Derwinski, 790 F. Supp. 1032 (E.D. Wash. 1991) 6

Protos v. Volkswagen of America, Inc., 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986) 8

Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978) . 9

Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988) 8

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 3, 7-13

Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970) 10, 11

Wisconsin v. Yoder, 406 U.S. 205 (1972) 10

Statutes and Rules:

29 C.F.R. Part 1630, Appendix § 1630.15(d) 6

42 U.S.C. § 2000e(j) 4, 5

42 U.S.C. § 12101(a)(1) 6

42 U.S.C. § 12111(9)(A) 6

42 U.S.C. § 12111(9)(B) 6

42 U.S.C. § 12112(a) 4

42 U.S.C. § 12112(b)(5)(A) 4

42 U.S.C. § 2000e-2(a)(1) 4

Miscellaneous:

Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987) 10

Michael W. McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1, 57; *accord* United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 104 n.1 (1983) 11

Michael W. McConnell, *Accommodation of Religion: An Update and A Response to Critics*, 60 Geo Wash. L. Rev. 685 (1992) 12

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BRIEF OF ADVOCATES INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Advocates International is a global network of advocates working in over 150 nations to establish and preserve religious liberty in the United States and abroad. In former Communist countries, Advocates International has worked to establish religious liberty as part of the rule of law. In the United States, Advocates International has focused on preserving the rights of all minority faiths, and assuring that religious liberties are accorded no less deference than other protected rights. These concerns are squarely implicated in this case.

SUMMARY OF THE ARGUMENT

Title VII requires, as do other civil rights laws such as the Americans with Disabilities Act, that employers "reasonably accommodate" their employees, unless that accommodation poses an "undue hardship" on the employers. In other civil rights contexts, the right of protected persons to seek "reasonable accommodation" has been generously interpreted by the courts. The same language in Title VII's religious protections has been narrowed to the brink of extinction. In this case, the Eleventh Circuit obliterated any remnant of a religious adherent's right to seek a "reasonable accommodation" of his religious practice. In so doing, the Eleventh Circuit wrongly extended the "de minimis" standard of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and, by requiring virtually no attempt at accommodation, placed itself in irreconcilable conflict with other circuits which require a good faith effort to make accommodations which involve little or no economic cost. The result in this case is contrary to the language and purpose of Title VII, and is neither mandated nor justified by the Establishment Clause of the United States Constitution. Yet, the lack of judicial guidance on this issue has led the Eleventh

Circuit to conclude that, while other protected groups receive substantial protection, courts may be indifferent to the interests of religious adherents. It is critical that the Court revisit this issue and lay down guidelines to restore substance to the religious protections of Title VII.

ARGUMENT

I. THE RIGHTS OF RELIGIOUS PEOPLE ARE BEING DISFAVORED, AS COMPARED TO THE RIGHTS OF ALL OTHER PROTECTED GROUPS

Two important antidiscrimination laws -- Title VII[1] and the Americans with Disabilities Act[2] ("ADA") -- contain identical statutory standards requiring "reasonable

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[1] Title VII of the Civil Rights Act of 1964, as amended, forbids employers to discriminate among employees (or potential employees) "because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). In 1972 Congress amended Title VII to include the following definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

[2] The Americans with Disabilities Act forbids "discriminat[ion]" against protected individuals. 42 U.S.C. § 12112(a). "Discriminat[ion]" is defined as "not making reasonable accommodations" to the disabled persons "unless such covered entity can demonstrate that the accommodation would impose an undue hardship of the operation of the business." 42 U.S.C. § 12112(b)(5)(A).

accommodation" unless such accommodation causes "undue hardship" to an employer. Yet, these statutes are spawning judicial interpretations so wildly disparate as to offend common sense. As a result of this disparity, the rights of religious people are accorded less legal protection than the rights of people in other classes which the federal government has undertaken to protect. In their anxiety to remain neutral on religion, some courts have begun the process of stripping the religion protections of Title VII of any substance. Thus, instead of remaining neutral, the courts are transforming religious rights into disfavored rights.

The opinion of the Eleventh Circuit in this case is an extreme example of this distressing trend. If the Eleventh Circuit's opinion is allowed to stand, Congress' mandate that an employer must "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless the employer can show that such accommodation would cause "undue hardship," 42 U.S.C. § 2000e(j), has been rendered meaningless. The Tampa Police Department admittedly made no effort, beyond allowing one Saturday off, to reasonably accommodate the religious practice of Mr. Beadle, although the Department could have made assignment changes which would have had no economic impact. There was no real showing that these easily accomplished assignment changes would have negatively impacted other employees or the functioning of the Department. Yet, the Eleventh Circuit said the Department had no obligation to do more. In the process, the Eleventh Circuit unreasonably extended the definition of "undue burden" which formerly excused employers from efforts which require the employer to bear "more than de minimis [economic] cost" to hold that an employer need not accommodate a religious employee if the accommodation involves "more than de minimis" effort of any kind whatsoever. This unjustified application of the "de

minimis" test to purely non-economic accommodations leaves the religious employee with no meaningful right to seek accommodation at all.

By contrast, the enormous numbers[3] of persons who fall within the ADA's extremely broad scope may employ identical statutory language to obtain "reasonable accommodations" which may impose substantial expense on their employers,[4] require job restructuring,[5] and require special privileges for protected persons and/or impositions on fellow employees.[6] The modestly modified work schedule sought by Mr. Beadle, which the Eleventh Circuit held was an "undue burden" under Title VII, would be a commonplace remedy if Mr. Beadle were claiming rights as a disabled person. Such a cost-free schedule modification would not come close to meeting the "undue hardship" standard under the ADA. In fact, such a remedy is specifically prescribed. 42 U.S.C. § 12111(9)(B).

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[3] Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(a)(1).

[4] For example, an employer may be required to make modifications to its facilities to accommodate a disabled person. 42 U.S.C. § 12111(9)(A). If the employer is deemed capable of absorbing the cost, he must do so. Employers are required to bear more than de minimis expense. 29 C.F.R. Part 1630, Appendix § 1630.15(d).

[5] 42 U.S.C. § 12111(9)(B).

[6] *See, e.g., Kent v. Derwinski*, 790 F. Supp. 1032 (E.D. Wash. 1991) (employer required to provide relaxed disciplinary approach to employee and sensitivity training to coworkers as reasonable accommodation to mentally retarded employee).

This nation has no less an interest in assuring that religious people may participate fully in American life than it has in guaranteeing identical rights for the disabled or for any other protected group. The Eleventh Circuit's cavalier treatment of "reasonable accommodation" in the religious context undercuts Congress' effort to provide such assurance and should be corrected by this Court.

II. THE DECISION BELOW CREATES AN IRRECONCILABLE CONFLICT BETWEEN THE ELEVENTH CIRCUIT, WHICH PERMITS EMPLOYERS TO MAKE VIRTUALLY NO ACCOMMODATION, AND CIRCUITS WHICH REQUIRE A SHOWING OF GOOD FAITH EFFORT TO MAKE ACCOMMODATION

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), is the leading case interpreting "undue hardship" under Title VII. *Hardison* addresses an employer's obligation under Title VII to accommodate an employee whose religious convictions barred him from working on Saturdays. *See id.* at 66. Work shifts at TWA were governed, in part, by a seniority system included in a collective bargaining agreement. *See id.* at 67. When Hardison voluntarily transferred to a new building he lost the seniority by which he had previously avoided work on his sabbath. *See id.* at 68. Allowing Hardison to have every Saturday off would have left TWA with the dilemma of having an essential position empty, since Hardison was the only employee who could fill the position, or employing someone not regularly assigned to work Saturdays at premium wages. *Id.* at 67. When Hardison refused to report to work on Saturday, he was discharged. *Id.* at 69. This Court held that TWA would have suffered an

undue hardship within the meaning of Title VII if it were compelled "to carve out a special exception to its seniority system" (*id.* at 83) or "to bear more than a de minimis cost" (*id.* at 84) "either in the form of lost efficiency in other jobs or higher wages." *Id.*

In this case, the Eleventh Circuit misapplied *Hardison's* "de minimis" standard to include, not only considerations of cost and efficiency, but virtually any effort -- even cost-free efforts -- which an employer might be asked to make to accommodate an employee. *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995). Thus, where the Tampa Police Department could have made a slight alteration in Beadle's schedule, without significant cost or efficiency implications, the Department was not required even to do that, because even this simple effort was considered a "more than de minimis" burden on the employer's business. *Id.*

This holding creates a conflict with other circuits which have attempted to give meaning to Title VII's religious protections by requiring some good faith effort at accommodation, if such can be made without adverse economic impact. For example, the Eighth Circuit applied *Hardison's* "de minimis" standard in *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979).[7] There the court

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[7] *Brown's* reading of Title VII's "undue hardship" requirement has been adopted by other circuits. *See, e.g., Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1089 (6th Cir. 1987) (holding that a mining company failed to meet its duty to accommodate an employer's religious practices when it refused to solicit other employees to swap shifts after the affected employee told the company that his religious convictions prevented him from requesting the shift change himself), *cert. denied*, 485 U.S. 989 (1988); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, (3d Cir.) (holding that because Volkswagen suffered no undue hardship because it would have paid no higher wages as a result of accommodating the

addressed whether General Motors (GM) violated Title VII when it terminated Brown for refusing to work on Saturdays. The Eighth Circuit concluded that, under *Hardison,* "[s]ection 703(a)(1) . . . requires an employer to accommodate the religious observances of its employees unless such accommodation would contravene the provisions of a valid collective bargaining agreement or would cause the employer undue hardship." *Id.* at 958. The Eighth Circuit interpreted "undue hardship" in terms of "de minimis cost" and measured that cost in terms of "overtime," "wages," or "lost efficiency" (*Brown*, 601 F.2d at 959); it found that GM had not incurred any of these as a result of trying to accommodate Brown. *Id.* From this the Eighth Circuit concluded that GM had failed to meet its obligations under Title VII. *See id.* at 962.

Brown and *Beadle* cannot be reconciled. In *Brown* the Eighth Circuit narrowly interpreted *Hardison's* "de minimis cost" test to include only financial considerations. *See id.* at 958-60. In *Beadle* the Eleventh Circuit applied the "de minimis" limitation to any "burden in conducting [the employer's] business." *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995). *Brown* expressly refused as proof of "undue hardship" GM's speculative costs arising from "the alleged cumulative effect that will arise when large numbers

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employee's request not to work Saturdays), *cert. denied*, 479 U.S. 972 (1986); *Burns v. Southern Pac. Transport. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (holding that a union proved no undue hardship merely because it would lose $19 a month in dues and speculated that other union members might invoke religious scruples to avoid union membership and dues), *cert. denied*, 439 U.S. 1072 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 903-04 (7th Cir. 1978) (holding that GAF violated Title VII when it "made no effort to accommodate" an employee's request not to work Saturdays so that he could lead a Bible study course and that GAF could point neither to lost efficiency nor to increased wages if it had tried to accommodate its employee).

of employees want Friday nights off . . . ." *Brown*, 601 F.2d at 960. *Beadle* rested its holding on the vague, speculative conclusion that "requiring the Department to grant shift exceptions to Beadle would result in greater than de minimis cost in light of the public health, safety and welfare considerations associated with police work." *Beadle*, 42 F.3d at 636.

While this Court need not resolve every circuit split, *see* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417, 1434-35 (1987), the conflict between *Beadle* and those circuits following the *Brown* approach merits review for at least two important reasons. First, neither statute nor legislative history provides guidance on the scope of an employer's duty to accommodate religious practices and an employee's right to demand such accommodation under Title VII. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). Second, and most important, the intercircuit conflict has arisen because this Court has not squarely addressed the significant constitutional question raised in *Hardison*: To what extent does the Establishment Clause of the Constitution relieve employers of the obligation to accommodate religious rights to the same degree that other important rights must be accommodated?

III. THE GRUDGING SCOPE GIVEN THE "UNDUE HARDSHIP" STANDARD BY THE ELEVENTH CIRCUIT IS NOT CONSTITUTIONALLY REQUIRED

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987) (citing *Wisconsin v. Yoder*, 406 U.S. 205

(1972). "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 673 (1970). However, in *Hardison*, this Court limited the scope of Title VII's religious protections in order to avoid deciding whether and when the Establishment Clause singles out the rights of religious adherents and truncates them, rather than protecting them co-equally with the rights of other protected groups. As one commentator has stated, "[T]he Court construed the Title VII requirements narrowly -- far more narrowly than the language and legislative history would suggest. This may have been to avoid deciding the constitutional question . . . ." Michael W. McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1, 57; *accord* United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 104 n.1 (1983).

Though the majority avoided the question, Justices Marshall and Brennan, in dissent, argued that "not all accommodations are costly, and the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. . . . [T]he mere fact that the law sometimes requires special treatment of religious practitioners does not present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' against which the Establishment Clause is principally aimed." *Hardison*, 432 U.S. at 90, 91 n.4 (Marshall, J., dissenting) (citations omitted). By requiring employers to accommodate the religious practices of their employees so long as accommodation imposes no "undue hardship" on them, Title VII promotes free exercise values within the confines of the Establishment Clause.

Clearly, the accommodation requested by Mr. Beadle was of the type anticipated by Justice Marshall: It is not costly. Yet, the lack of Constitutional guidance in this area has permitted the Eleventh Circuit to infer from *Hardison* that even this minimal accommodation is not required by Title VII. Surely, this result requires that the Court revisit this issue and restore some substance to the religious protections of Title VII.

A prominent commentator on religion and the law has summarized the Establishment Clause argument as follows:

> In part, the issue of accommodations in the private sphere hinges on conceptual changes in legal doctrine arising from the twentieth-century expansion of the welfare-regulatory state. In an earlier era, when most personal interests were left to the tender mercies of the private market, the accommodation of religion in the private sphere would have been a form of promotion or favoring of religion. Now, when government intervenes in the private sphere to protect a wide variety of personal interests, the idea that religious interests (alone) should be treated with indifference cannot be maintained. When government protects religious freedom in the private sphere in ways comparable to its protection of secular interests, it should be held to be constitutional.

Michael W. McConnell, *Accommodation of Religion: An Update and A Response to Critics*, 60 Geo Wash. L. Rev. 685, 712 (1992).

CONCLUSION

At a time when the rights of other protected groups have expanded, the Eleventh Circuit has, as a practical matter, obliterated any right of a religious adherent to seek accommodation of his religious practice from his employer. Yet, "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting). Respectfully, it is the obligation of this Court to review and reverse this decision, and to set out guidelines which will restore meaning to the religious protections of Title VII.

Dated: May 19, 1995

Respectfully submitted,

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